In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-421

CLEVELAND BROWNS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. A1) is not yet reported. The Temporary Emergency Court of Appeals rendered no opinion (Pet. App. B).

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on September 13, 1974. The petition for a writ of certiorari was filed on October 15, 1974. The jurisdiction of this Court is invoked under Section 211'g) of the Economic Stabilization Act of 1970, as amended, 85 Stat. 750, 12 U.S.C. (Supp. II, 1970 ed.) 1904.

QUESTIONS PRESENTED

1. Whether technical non-compliance with Section 553 of the Administrative Procedure Act, 5 U.S.C. 553, by the President in issuing Executive Order 11615, which imposed a 90-day freeze on prices, rents, wages and salaries, invalidated the freeze.

2. Whether the administrative interpretations of the Office of Emergency Preparedness should be afforded great deference.

3. Whether the application of Executive Order 11615 to petitioner's advance sales of football game tickets constitutes an *ex post facto* law or is a taking of petitioner's property without just compensation.

4. Whether petitioner may be required, as a means of restitution, to reduce the prices for future ticket sales until the amount of money received as overcharges of unidentified ticket purchasers is exhausted.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article I, Section 9, clause 3 of the United States Constitution provides in pertinent part:

> No * * * ex post facto Law shall be passed.

The Fifth Amendment of the United States Constitution provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553 (Pet. App. F 73-74) and Executive Order 11615 (Pet. App. G) are set forth in the Appendix to the petition for a writ of certiorari.

Circular No. 7 issued by the Office of Emergency Preparedness (36 Fed. Reg. 17578) provides in pertinent part:

> A transaction takes place when the seller ships the product to the buyer, not when the order is received. In the case of a service, the transaction takes place when the service is performed.

Circular No. 11 issued by the Office (36 Fed. Reg. 18315) provides in pertinent part:

> The freeze applies to prices of advance sale tickets for sporting events occurring during the freeze.

STATEMENT

Petitioner owns and operates the Cleveland Browns professional football team (the "Browns"). In January 1971 the Browns announced an increase in home game ticket prices for the 1971 football season. By August 12, 1971, the Browns had sold 48,033 season tickets and 86,347 individual game tickets for the 1971 football season.

On August 15, 1971, the President issued Executive Order 11615, which imposed a 90-day freeze upon prices, rents, wages and salaries. Under Executive Order 11615, prices were to be stabilized

> at levels not greater than the highest of those pertaining to a substantial volume of actual transactions * * * of any kind during the 30-day period ending August 14, 1971, for like or similar commodities or services [Pet. App. G76].

The Browns played no home games in the 30-day period prior to August 15, 1974. Therefore, under the Executive Order the highest price which could have been charged was

> the highest price * * * in the nearest preceding 30-day period in which transactions did occur [Pet. App. G76].

The President delegated to the Cost of Living Council the authority to implement Executive Order 11615. The Council then delegated to the Office of Emergency Preparedness (the "Office") authority to implement and administer the Executive Order. 36 Fed. Reg. 16215.

On September 2, 1971, the Office issued Circular No. 7, which provided with respect to "transactions" as used in the Executive Order:

> A transaction takes place when the seller ships the product to the buyer, not when the order is received. In the case of a service, the transaction takes place when the service is performed.

The Office further determined, in Circular No. 11, that "[t]he freeze applies to prices of advance sale tickets for sporting events occurring during the freeze."

The United States commenced this action in the United States District Court for the Northern District of Ohio, seeking to enforce the Executive Order, as interpreted by the Office, against petitioner. The district court granted the government's motion for summary judgment and ordered petitioner to make restitution of the increase in the prices received for home games played during the 90-day freeze, by making refunds to identifiable purchasers and by reducing future ticket prices

until the total overcharges to unidentifiable purchasers are offset. The Temporary Emergency Court of Appeals affirmed (Pet. App. B).

ARGUMENT

1. The first three questions raised here are essentially the same as those raised in *University of Southern California* v. *Cost of Living Council*, 472 F. 2d 1065 (T.E.C.A.), certiorari denied, 410 U.S. 928, and *DeRieux* v. *The Five Smiths, Inc.*, 499 F. 2d 1321 (T.E. C.A.), certiorari denied *sub nom. The Five Smiths, Inc.* v. *Hollaway*, No. 73-2046, decided October 21, 1974.[1] With respect to those issues we rely upon our brief in opposition in *The Five Smiths*, a copy of which is being furnished to petitioner.

2. The district court did not abuse its discretion by ordering restitution of the monies received from unidentified ticket purchasers to be made by reducing future ticket prices. Section 209 of the Economic Stabilization Act, as amended, 85 Stat. 748, 12 U.S.C. (Supp. II, 1970 ed.) 1904, explicitly authorizes the district court to order restitution. The type of distribution ordered here is an accepted restitutionary remedy, cf. *Bebchick* v. *Public Utilities Commission*, 318 F. 2d 187 (C.A. D.C.); *Market Street Railway Co.* v. *Railroad Commission*, 28 Cal. 2d 363, and therefore is within the statutory provision for restitution.[2] A contrary conclusion would mean that the statute permits the Browns to retain the unlawful overcharges.

---

[1]The same issues are also presented in *Oakland Raiders* v. *Office of Emergency Preparedness*, petition for a writ of certiorari pending, No. 74-85.

[2]The authority cited by the Browns, *Eisen* v. *Carlisle & Jacquelin*, 479 F. 2d 1005 (C.A. 2), vacated on other grounds, No. 73-203, decided May 28, 1974, is inapposite because it concerned only the distribution of damages in a private antitrust class action under Fed. R. Civ. P. 23. See Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. Chi. L. Rev. 448 (1972).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

CARLA A. HILLS,
Assistant Attorney General.

ROBERT E. KOPP,
PAUL T. MICHAEL,
Attorneys.

NOVEMBER 1974.

DOJ-1974-11